No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF MAYOR ERIC GARCETTI, COUNTY EXECUTIVE DOW CONSTANTINE, MAYOR JENNY DURKAN, MAYOR RAHM EMANUEL, MAYOR JAMES KENNEY, AND MAYOR BILL DE BLASIO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DONALD B. VERRILLI, JR.
Counsel of Record
DAHLIA MIGNOUNA
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

(Additional Counsel Listed on Inside Cover)

EDWARD N. SISKEL
CORPORATION COUNSEL OF
THE CITY OF CHICAGO
30 N. LASALLE STREET,
SUITE 800
CHICAGO, IL 60602

ATTORNEY FOR *AMICUS*,
MAYOR RAHM EMANUEL

SOZI PEDRO TULANTE
CITY SOLICITOR FOR THE
CITY OF PHILADELPHIA
1515 ARCH STREET
17TH FLOOR
PHILADELPHIA, PA 19102

ATTORNEY FOR *AMICUS*,
MAYOR JAMES KENNEY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 4

ARGUMENT 11

I. First Amendment doctrine recognizes a vitally important distinction between government as an employer and government as a sovereign. 11

II. *Abood* strikes the same balance as does the *Pickering/Garcetti* framework. 16

III. The case for overruling *Abood* is wholly unpersuasive. 24

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) ..... passim

Air Line Pilots Ass'n v. Miller,
523 U.S. 866 (1998) 21

Borough of Duryea v. Guarnieri,
564 U.S. 379 (2011) ..... passim

Branti v. Finkel,
445 U.S. 507 (1980) 31

City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n,
429 U.S. 167 (1976) 30

Communications Workers of Am. v. Beck,
487 U.S. 735 (1988) 20, 21

Connick v. Myers,
461 U.S. 138 (1983) ..... passim

Elrod v. Burns,
427 U.S. 347 (1976) 17

Engquist v. Oregon Dep't of Agric.,
553 U.S. 591 (2008) 16

Friedrichs v. California Teachers Ass'n,
136 S. Ct. 1083 (2016) 6

Garcetti v. Ceballos,
547 U.S. 410 (2006) ..... passim

Gilpin v. AFSCME,
875 F.2d 1310 (7th Cir.),
cert. denied, 493 U.S. 917 (1989) 21

Harris v. Quinn,
134 S. Ct. 2618 (2014) 25

International Ass'n of Machinists v. Street,
367 U.S. 740 (1961) 21

Keller v. State Bar of Cal.,
496 U.S. 1 (1990) 21, 34, 35

Knox v. Service Emps. Int'l Union,
132 S. Ct. 2277 (2012) 25

Lane v. Franks,
134 S. Ct. 2369 (2014) 15

Lehnert v. Ferris Faculty Ass'n,
500 U.S. 507 (1991) 21, 22, 24, 29

Locke v. Karass,
555 U.S. 207 (2009) 25

Perry Educ. Ass'n v. Perry Local Educators Ass'n,
460 U.S. 37 (1983) 23

Perry v. Sindermann,
408 U.S. 593 (1972) 17

Pickering v. Board of Educ. of Twp. High Sch. Dist. 205,
391 U.S. 563 (1968) 14, 15, 17

Railway Employes' Dep't v. Hanson,
351 U.S. 225 (1956) 18

Rankin v. McPherson,
483 U.S. 378 (1987) 15

Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,
487 U.S. 781 (1988) 30

Rutan v. Republican Party,
497 U.S. 62 (1990) 12, 31

Shelton v. Tucker,
364 U.S. 479 (1960) 14

United Pub. Workers of Am. (C.I.O.) v. Mitchell,
330 U.S. 75 (1947) 14

United States v. Nat'l Treasury Emps. Union,
513 U.S. 454 (1995) 29

Waters v. Churchill,
511 U.S. 661 (1994) 15

Wieman v. Updegraff,
344 U.S. 183 (1952) 14

STATE CASES

McAuliffe v. Mayor of New Bedford,
29 N.E. 517 (Mass. 1892) 12

FEDERAL STATUTES

5 U.S.C. § 7321 *et seq.* 13, 34, 37

29 U.S.C. § 158(a)(3) 21

45 U.S.C. § 152 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... passim

OTHER AUTHORITIES

Casey Ichniowski & Jeffrey S. Zax,
Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector,
9 J. Lab. Econ. 255 (July 1991) 8

Joel Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations*, 44 ILR Rev. 241 (1991) 6

Lloyd G. Reynolds, *Labor Economics and Labor Relations* (8th ed. 1982) 7, 9

Mancur Olson, *The Logic of Collective Action* (2d ed. 1971).....9

Richard B. Freeman & James L. Medoff, *What Do Unions Do?* (1984).....6, 7, 8

Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity* (Nat'l Bur. Of Econ. Research, Working Paper No. 6120, 1997).....7

INTEREST OF *AMICI CURIAE*

Amici are the executives of some of the largest cities and counties in the country. They file this brief to share their perspective based on their many years of service and significant management experience.

Amicus Eric Garcetti is the forty-second Mayor of the City of Los Angeles, the Nation's second-largest city, with a population of approximately four million people.[1] As Mayor, *amicus* oversees the Police Department, the Fire Department, the Department of Transportation, the Department of Water and Power, the Public Library, and numerous other departments and agencies that provide services vital to the health and welfare of the people of Los Angeles. The City of Los Angeles employs over 50,000 employees, 98% of whom are represented by a union.

Amicus Dow Constantine is the County Executive for King County, Washington, the thirteenth-largest county in the United States, with 2.1 million diverse residents living in 39 cities and in a large unincorporated area. Executive Constantine oversees the Departments of Transportation, Natural Resources and Parks, Public Health, Community and Human Services, as well as other departments that

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided blanket consent to the filing of *amicus* briefs in this case.

serve the Executive's passion for environmental protection, public transit and government reform. King County has seventy-nine collective bargaining agreements and partners with thirty-two unions. More than 80% of its workforce – over 12,000 employees – are represented by unions.

Amicus Jenny A. Durkan is the Mayor of Seattle, the Nation's fastest growing major city. As Mayor, *amicus* oversees the Seattle Police, Fire, Transportation, Public Utilities, and Housing Departments, among others, which provide services vital to the health and welfare of the people of Seattle. The City of Seattle has over 8,000 represented employees, and its more than 25 collective bargaining agreements with its union partners have been critical for meeting the challenges created by its rapid population growth.

Amicus Rahm Emanuel has served since 2011 as the fifty-fifth Mayor of the City of Chicago, the Nation's third largest city, with a population of approximately 2.7 million people. As Mayor, *amicus* oversees the Departments of Police, Fire, Transportation, Streets and Sanitation, and Water Management, as well as numerous other departments and agencies that provide services vital to the health and welfare of the people of Chicago. The City of Chicago has approximately 32,000 employees, and more than 90% are unionized. There are roughly half a million union households in Chicago and Cook County.

Amicus James F. Kenney is the ninety-ninth Mayor of the City of Philadelphia, the Nation's fifth-largest city, with a population of approximately 1.5 million

people. As Mayor, *amicus* oversees all operating departments that provide services vital to the health and welfare of the people of Philadelphia. The City of Philadelphia has more than 28,000 employees, approximately 23,000 of whom are represented by unions.

Amicus Bill de Blasio is the 109th Mayor of the City of New York, the Nation's largest city, with a population of over 8.5 million people. As Mayor, *amicus* oversees around 50 city agencies responsible for preserving and promoting the public health and welfare of the people of New York City. The City employs more than 380,000 employees, about 95% of whom are represented by a union.

In *amici*'s experience, maintaining a positive collective bargaining system is integral to the effective management of the public sector workforce, and a fairly administered agency-fee requirement is in turn integral to the success of the collective bargaining process. The benefits of a stable, and adequately funded, employee representative encompass much more than merely ensuring labor peace and avoiding debilitating strikes and other disruptions. *Amici* have found that working cooperatively with unions as effective employee representatives has yielded, and promises to continue to yield, fruitful labor-management cooperation that improves the quality and efficiency of government services delivered to the public.

With respect to public sector collective bargaining, as with many important governance issues, this Court has long recognized the importance of affording state

and municipal authorities the discretion they need to carry out their responsibilities in a manner that is responsive to particular local conditions and needs. A ruling from this Court that overrules *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and denies state and municipal government employers the option of requiring agency fees within the framework of collective bargaining would thus amount to "judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici are responsible for ensuring that their communities are safe, harmonious and productive. And they serve closest to and are directly accountable to the people. Delivering effective police and fire protection, clean and well-maintained thoroughfares, and good public schools, as well as myriad other important services effectively and efficiently is what they are elected to do.

To fulfill their obligations, municipal and county executives must be able to respond flexibly to local conditions and needs, which can vary dramatically from place to place. For that reason, these officials have always been afforded wide latitude under our Constitution to carry out the basic obligations of public administration. That deference is a core manifestation of our commitment to federalism. We value and protect the exercise of governmental authority by

leaders closest to the people because they are in the best position to respond effectively to the people's needs.

This principle is vital to the ability of municipal and county executives to manage their public workforces. For it is through management of the workforce that government ultimately fulfills its obligation to deliver public services effectively and efficiently. Different government employers face different local cultures, different histories and different labor markets. They have therefore drawn upon their accumulated expertise in public administration and their understanding of local needs, conditions, and practices to adopt a wide range of varying approaches to labor-management relations.

These decisions in turn reflect judgments about how best to accommodate the government's interest as an employer in effective and efficient delivery of public services, the public's interest in receiving those services, and the interests of public employees. In particular, because experiences and expectations about unionization vary widely across the country, public employers must choose whether to forbid collective bargaining, to accept it grudgingly, or to embrace and seek to channel it to optimize workforce management and public administration. There is no single right answer. What is critical is that state and local governments have the discretion to choose the course that makes most sense for them.

In making that choice, governments can pursue various collective bargaining goals, some more modest and others more ambitious. At the most basic level,

recognizing collective bargaining rights can reduce the risk of labor strife, and in particular crippling strikes. *See* Br. for New York *et al.*, at 13-20, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (Mem.) (No. 14-915). As a further step, public employers can also seek a more normalized and sustained collective bargaining framework that ensures a reliable mechanism for addressing employee concerns. That framework can address employee compensation, tailoring the mix of salary and benefits to match employee priorities, Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 15 (1984), thereby allowing public employers to improve satisfaction, reduce turnover, and compete more effectively for talent. It can also respond to employee grievances through a process employees perceive as fair and reliable, in part because their union is a vital participant. *See id.* at 104-105, 108-09.

Beyond that, collective bargaining may also foster more effective and efficient public administration. By working cooperatively with a union, management can persuade the union that its interest and those of its members lie in being part of the solution, rather than an antagonist of management. *See* Joel Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations*, 44 ILR Rev. 241, 244-45, 258 (1991). Unions thus have greater incentives to encourage workers to support management efforts to improve workplace functioning. That buy-in can take the form of more committed employee participation in self-correcting innovations than might otherwise be achieved, generating

improvements to the workplace and to the delivery of public services. *See id.* at 244-45.

In particular, the union can persuade the public employee workforce that it has a real stake in not opting out of management's efforts to improve efficiency and effectiveness. The union can provide a means for more nuanced input into improving the workplace, including criticism of current management approaches and the current workforce performance, in a manner that minimizes the risk to employees of providing that input. *See* Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity* 8 (Nat'l Bur. Of Econ. Research, Working Paper No. 6120, 1997) (discussing these benefits in the private-sector context); Freeman & Medoff, *supra*, at 15. Fostering this kind of positive collaboration requires the development of bilateral trust relationships. It also requires an environment that encourages members of the workforce to work together with management, rather than see management efforts to increase efficiency and productivity as counter to employees' interests.

Each tier of commitment to collective bargaining entails a different balance of efficiencies. All work better if the union is a secure institution that is not constantly campaigning in order to survive. That is, the government benefits when the union does not feel that it must constantly "prove itself" by stoking antagonism toward the government employer in an effort to convince employees that they need the union's protection and should therefore join it and contribute financially despite the lack of any requirement to

contribute or direct individualized benefit from doing so. *See* Lloyd G. Reynolds, *Labor Economics and Labor Relations* 444 (8th ed. 1982). A stable collective bargaining framework can thus allow unions to contribute to the public employer's efforts to achieve the kind of cooperative, innovative workforce that can meaningfully improve the efficiency and effectiveness of public services. *See* Freeman & Medoff, *supra*, at 165.

A constitutional ruling forbidding public employers from including agency-fee requirements in a collective bargaining framework would be antithetical to the interest of state, municipal and county governments in sound public administration – particularly the more ambitious efforts to enlist employee cooperation in improving public services. Such a ruling would invariably introduce intractable free-rider problems. The duty of fair representation obligates a union to represent the interests of all its members. Every employee can therefore expect to receive the benefits of union representation in the collective bargaining process (and in the administration of collectively bargained agreements) whether the individual contributes a fair share of the associated costs or chooses instead to free-ride on the financial contributions of their fellow workers. *See* Casey Ichniowski & Jeffrey S. Zax, *Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. Lab. Econ. 255, 257 (July 1991).

For each employee, the choice not to join the union or contribute to defraying the cost of collective bargaining is understandable, and may not reflect any lack of support for the union's positions. While many

employees may well choose to support the union despite these incentives, it is reasonable to assume that many will not, given that there will be no relationship between an individual's choice and the benefits to be received. *See* Mancur Olson, *The Logic of Collective Action* 76, 88 (2d ed. 1971). And this incentive structure gives rise to a vicious cycle. Each employee who chooses not to support the union increases the cost to the employees who continue to provide financial support. *See* Ichniowski & Zax, *supra*, at 257. As the costs of support continue to escalate, the pressure to opt out intensifies.

Faced with these pressures, an "us versus them" mentality can become pervasive. Where the workforce may already feel exploited by their employer, unions are incentivized to focus on management disputes in order to demonstrate the immediate benefits they can provide to employees. Opportunities for cooperation can quickly devolve into acrimonious disputes with management. *See* Reynolds, *supra* at 444. Unions will also face increased pressure to deliver short-term palpable benefits to their members in order to convince workers to stick with the union. That constraint diminishes the prospects for cooperative arrangements that may have longer term payoffs for workers as well as management, even at the cost of foregoing some short-term benefits.

The free-rider problem can also generate acrimony among members of the workforce, further impeding the government's interest in effective and efficient delivery of public services. It stands to reason that employees who join the union and thereby contribute their fair share to the substantial cost of the collective

bargaining process (and to contract administration) will resent those who choose to free ride. Those kinds of conflicts are corrosive of workplace morale. They can be particularly threatening to the public interest when the performance of government employees (police officers, firefighters, and corrections officers such as those represented by Respondent, for example) vitally depends on cooperation between workers responsible for responding to hazardous or dangerous situations.

Given that more than twenty States and the District of Columbia have (with some variation in the specifics) authorized agency fees in the context of collective bargaining with public employee unions, a decision by this Court to overrule *Abood* would cause widespread disruption of existing arrangements and the workplace stability they secure. It would also deny to the governments closest to the people an option that many of them have found important to their ability to carry out their responsibilities. And it would do so on the basis of an evaluation of the legitimacy and strength of governments' managerial interests that the judicial branch is particularly ill-equipped to make.

Overruling *Abood* would also mark a sharp and anomalous departure from this Court's First Amendment precedents. This Court has consistently recognized that when government acts in its capacity as an employer managing its workforce, rather than in its capacity as a sovereign regulating the citizenry, it should be given a wide berth. So long as a restriction on employee speech reasonably advances the employer interest in managing its workforce, it will be upheld – and this is so even when an employee speaks as a

citizen on a matter of public concern. *Garcetti*, 547 U.S. at 418.

That core principle is fully applicable here. A government employer's managerial prerogatives are every bit as important in the collective bargaining context as they are in other areas of public administration. And a government employee's interest in not paying agency fees to support collective bargaining is certainly no weightier (if anything it is less weighty) than an employee's interest in speaking as a citizen on matters of public concern. Treating public sector agency fees as categorically different from other public employee speech thus lacks any principled justification. Overruling *Abood* would therefore not only be wrong on its own terms, but would also profoundly threaten the long-established principles of deference that afford municipal and county executives the breathing space they need to deliver vital public services effectively and efficiently.

ARGUMENT

I. First Amendment doctrine recognizes a vitally important distinction between government as an employer and government as a sovereign.

This Court's First Amendment jurisprudence has long recognized that "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."

Connick v. Myers, 461 U.S. 138, 151 (1983) (citation omitted). That is because "government has a substantial interest in ensuring that all of its operations are efficient and effective." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011). To accommodate that interest, this Court has repeatedly held that "a government entity has broader discretion to restrict speech when it acts in its employer role" than when it acts as a sovereign regulating the citizenry. *Garcetti*, 547 U.S. at 411. Correspondingly, when a citizen chooses to accept government employment, "the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418; *accord Guarnieri*, 564 U.S. at 387 (restrictions on public employee speech "are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest.").

In fact, as a matter of original historical understanding, conditions on public employment related to an employee's speech were not considered a First Amendment "abridgement of speech" at all. Until the mid-Twentieth Century, "the unchallenged dogma was that a public employee had no right to object to conditions . . . of employment – including those which restricted the exercise of constitutional rights." *Garcetti*, 547 U.S. at 417; *Connick*, 461 U.S. at 143; *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) (A policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."). Government employers often filled positions using political affiliation as a criterion "without any thought that it could be unconstitutional . . . from the earliest days of

the Republic." *Rutan v. Republican Party*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

The original historical understanding gave way "in the 1950s and early 1960s," in cases involving requirements that "public employees . . . swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144. These decisions addressed the risk that government might, in regulating the speech of public employees *qua* employees, "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

Even then, the Court cabined its departure from the foundational principle of deference to government's managerial prerogatives. The Court differentiated between employment conditions that reflect the same interests that a private employer would have in maintaining workforce effectiveness, and those that threaten to restrict a public employee's rights as a private citizen outside the workplace. The former continued to receive deferential review, while the latter drew more exacting constitutional scrutiny.

That important distinction reflects the doctrine's long-standing respect – and the Court's continuous solicitude – for the government's prerogatives as an employer. As long as a public employer acts *qua* employer, the doctrine gave great weight to its managerial interest, even in the face of an employee's First Amendment interests. For example, in upholding a provision of the Hatch Act, the Court recognized that the government was "responsible for an efficient public

service," and could reasonably decide that "efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 99 (1947). The Court balanced "the interference with free expression . . . as compared with the requirements of orderly management of administrative personnel." *Id.* at 94.

The Court has applied this balancing approach consistently in evaluating employment rules that affected the speech interests of public employees. It has applied this approach in evaluating requirements that apply prospectively to an entire class of employees as well as those that affected only individual employees, and it has done so in cases where government compelled employee speech as well as those that restricted employee speech. *See, e.g., Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952) (discussing the Court's approach in *Mitchell* and striking down the challenged employee loyalty oath because it was arbitrary); *Shelton v. Tucker*, 364 U.S. 479, 485-86, (1960) (balancing the state's interest in "inquir[ing] into the fitness and competence of its teachers" and a "teacher's right of free association, a right closely allied to freedom of speech").

In *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968), the Court cited *Wieman* and *Shelton* to support the balancing framework it applied to evaluate a public employee's claim that he was unconstitutionally penalized for expressive activities. The Court reiterated that when evaluating employment-related burdens on speech, the appropriate First Amendment

approach "balance[s] . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

In the decades since *Pickering*, this Court has continued to refine this balancing approach in cases involving First Amendment challenges to public employment conditions. *See Connick*, 461 U.S. 138; *Garcetti*, 547 U.S. 410; *Guarnieri*, 564 U.S. 379 (applying the balancing framework to a Petition Clause claim). As definitively articulated in *Garcetti*, if an employee does not speak "as a citizen on a matter of public concern," the "employee has no First Amendment cause of action" at all. *Garcetti*, 547 U.S. at 418. Even if the employee does speak on a matter of public concern, the employee's claim fails if "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.*

Under this test, the level of scrutiny is not dictated by the motivation of the employee – that is, whether the employee seeks to speak as a citizen on a matter of public concern. *See Connick*, 461 U.S. at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement"); *accord Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014); *Rankin v. McPherson*, 483 U.S. 378, 386 (1987). Instead, the level of scrutiny depends on whether the speech takes place within the context of the employment relationship and whether the government has limited the employee's speech interest in order to advance its

interest in carrying out the government's business. *See generally Waters v. Churchill*, 511 U.S. 661, 672-75 (1994) (plurality opinion); *Connick*, 461 U.S. at 147-48.

As the Court has repeatedly made clear, these decisions reflect a "cautious and restrained approach to the protection of speech by public employees," *Guarnieri*, 564 U.S. at 389, that does not impose "an unduly onerous burden on the State" to justify its conduct. *Connick*, 461 U.S. at 149. This balancing is necessary, even in the face of potentially substantial employee speech interests, because "the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (citation omitted). That the Court would recognize the strength of this governmental interest is hardly surprising. Public employers face many of the same challenges as their private sector counterparts. They need comparable authority and flexibility, including the ability to use managerial methods commonly used in the private sector to address analogous problems.

II. *Abood* strikes the same balance as does the *Pickering/Garcetti* framework.

The crux of the Court's employment-conditions jurisprudence is that the First Amendment permits restrictions on employees' expressive interests within the context of the employment relationship, so long as they bear a reasonable relationship to the government's interest as an employer. Thus, an

employee can be penalized even for speech on matters of public concern when the public employer has an "adequate" employment-related justification. *Garcetti*, 547 U.S. at 418.

The same balance of interests is at the heart of the agency fee issue now before the Court. Once a workforce majority has chosen collective bargaining and selected a bargaining representative, a public employer can reasonably conclude that its interests are best served by ensuring that the representative is secure in its position, and able to perform its role within the collective bargaining system. The employer therefore can appropriately decide that agency fees covering costs germane to collective bargaining, contract administration and grievance adjustment are integral to achieving the benefits of collective bargaining. The government, however, cannot require that public employees support a union's political or ideological activity outside the structured collective bargaining relationship.

Abood reflects a weighing of precisely these interests. The primary argument the Court considered was that public-sector agency fees violated the principle that "public employment cannot be conditioned upon the surrender of First Amendment rights." 431 U.S. at 226. The challengers expressly relied on *Pickering* and *Perry v. Sindermann*, 408 U.S. 593 (1972). Appellants' Br. at 35, *Abood*, *supra*, No. 75-1153 (July 9, 1976). In rejecting that claim, the Court afforded the government's managerial interests the deference that was the hallmark of its First Amendment jurisprudence. At the same time, the Court distinguished between activities germane to

collective bargaining within the employment relationship (which agency fees could fund), and political activities outside the relationship (which such fees could not fund), citing *Sindermann* and *Elrod v. Burns*, 427 U.S. 347 (1976). *See Abood*, 431 U.S. at 225-29, 234. The Court did not expressly invoke *Pickering* as support for its balancing approach, because there would have been no reason to single out that particular case. It was merely one example of the First Amendment framework that the Court had consistently applied for decades in the public employment context.

Like the public employment cases that preceded it, *Abood* rests on the understanding that when government acts as an employer, its managerial prerogatives justify burdening employee speech interests so long as they reasonably advance the government's interest in delivering public services efficiently and effectively. Applying this principle in *Abood* was particularly appropriate, as the challenged government practice (the fee system) was borrowed from familiar private sector practices used by private employers to solve similar labor relations problems and achieve similar benefits. Indeed, Congress itself had authorized the use of just such practices in the private sector to achieve these ends. The Court in *Abood* thus drew on its earlier decision in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), which upheld a comparable arrangement in the private sector context. *See* 431 U.S. at 217-19. *Hanson* recognized that Congress had endorsed collective bargaining supported by agency fees in the Railway Labor Act as a legitimate option for employers to manage employment

relations. *Abood* simply afforded public employers comparable discretion.

Abood thus recognized that government has weighty interests in positive labor relations, and that a stable collective bargaining structure with an exclusive representative can advance those interests. A collective bargaining system provides for an agreed-upon and orderly system for incorporating employee preferences and concerns into personnel administration operations. Should such a system not function properly, public agencies could experience crippling disruptions that would damage their ability to deliver public services. They could also find themselves unable to attract or retain the most talented workers. As importantly, stable and productive labor-management relations are conducive to the kind of employer-employee partnerships that increase effectiveness and efficiency in delivering public services.

Although exclusive representation can thus serve the government's interests, it also creates a free-rider problem that can threaten the financial stability of the union and defeat the very purposes for which government may choose collective bargaining in the first place. *See supra*, pp. 8-9. A government employer can reasonably conclude that without adequate funding a union will struggle to represent employees effectively. After all, bargaining is not just about showing up to a negotiation session. "The tasks of negotiating and administering . . . the interests of employees in settling disputes and processing grievances are continuing and difficult ones" that can require "[t]he services of lawyers, expert negotiators,

economists, and a research staff, as well as general administrative personnel." *Abood*, 431 U.S. at 221. An underfunded exclusive representative may lack the resources needed to negotiate and implement agreements that advance employee interests effectively – thereby undermining both the employer and the employees' objectives in choosing collective bargaining.

A public employer can also reasonably conclude that requiring union members to bear the costs of a bargaining agent's efforts on behalf of other employees – including those who welcome and benefit from union representation, but chose to allow others to pay their share of the costs – is fundamentally unfair because it effectively penalizes union members. *Abood*, 431 U.S. at 221-22. In effect, union members end up with lower take-home pay than nonmembers based solely on their choice to provide the necessary support for the union. A public employer can reasonably determine that such unequal distribution of costs – which imposes serious burdens on the associational interests of the workforce's majority – will spawn resentment that will hamper its public mission. *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 749-50 (1988).

Furthermore, if a union has to convince employees to contribute financially despite the powerful incentives not to, it will be much more likely to resort to an "us against them" approach to relations with management in order to prove its value to its membership. *See supra*, p. 9. Needless to say, that would seriously undermine the public employers' efforts to use collective bargaining to improve workforce morale and implement innovative approaches to delivering government services.

The free-rider problem is therefore not principally about employees who, for ideological reasons, oppose union policies advanced in collective bargaining. The problem stems more broadly from "the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to," and who therefore "wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members." *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.) (Posner, J.), *cert. denied*, 493 U.S. 917 (1989).

It is for these reasons – ultimately to ensure that the collective bargaining system best achieves its purposes – that when "the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them" from nonmembers. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J. concurring in the judgment in part and dissenting in part). Put simply, agency fees are a legitimate solution to a personnel management problem for employers seeking the benefits of collective bargaining. This Court has repeatedly recognized the arrangement as a legitimate means of addressing the free-rider problem, in both the private and public sectors. *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 872-73 (1998); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990); *Abood*, 431 U.S. at 224; *International Ass'n of Machinists v. Street*, 367 U.S. 740, 765-66 (1961). And Congress, like many States, has determined as a policy matter that requiring each employee in a bargaining unit to defray a representative's costs is one appropriate means of

solving that problem. 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152 (Eleventh); *see Beck*, 487 U.S. at 755-56.

By the same token, the free-rider problem in collective bargaining is not equivalent to the moral hazard created by any organization that advocates policies favored by nonmembers. First, unlike political or ideological organizational activities among the general public, these activities take place within the system designed by the public employer to further workplace efficiency goals that a public employer has every right to further, including by imposing obligations on employees in their capacity as employees. Second, as Justice Scalia explained, the analogy to political or ideological organizing misses "what is distinctive . . . about the 'free riders' who are nonunion members of the union's own bargaining unit." *Lehnert*, 500 U.S. at 556. "*[T]hey* are free riders whom the law *requires* the union to carry – indeed requires the union to go *out of its way* to benefit, even at the expense of its other interests." *Id.* (emphasis in original).

To the extent that an agency-fee requirement impinges upon the speech interests of government employees, that impingement is no different in kind or degree from the kinds of speech restrictions this Court has routinely upheld in cases such as *Garcetti*. Unlike public employment conditions that limit an employee's ability to speak on a matter of public concern, an agency-fee requirement *operates entirely within the structure of a government's employment relations.*

In adopting collective bargaining, the government decides that – assuming a majority of the workforce

chooses an exclusive representative – the collective bargaining framework will be part of the official system of personnel administration. In effect, the union assumes "official responsibility" within that system as the "exclusive representative" of the workforce. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 51 (1983). Agency fees support the exclusive representative's official role within the channels the government has chosen to create for contract negotiation, contract administration, and grievance resolution. The fees impose obligations on employees *qua* employees as part of their employment responsibilities. Agency fees are thus no different from the workplace rules at issue in *Garcetti*, *Connick*, and other cases in which an employee complained that restrictions on workplace activity infringed the employee's right to speak on a matter of public concern. Just like employee speech restrictions, a public employer's decision to require agency fees to maintain the credibility and stability of the union within the collective bargaining system is an entirely legitimate exercise of the government's management prerogatives. In sum, these obligations are imposed by the government in its capacity as employer, on employees in their capacity as employees, in furtherance of employer labor-relations interests.

To be sure, different employers with different workforce compositions, histories, needs, and values may make their own judgments about how to manage their workforces. Some States do not permit collective bargaining by public employees; others have authorized collective bargaining but not agency fees; and over 20 States have authorized agency fees for

some or all employees. These diverse models no doubt reflect varying assessments of the impact and unfairness of the free-rider problem. They likely also reflect different labor market conditions, workforce cultures, and labor-management experiences in their regions – as well as genuine policy disagreements about whether, and to what degree, public-sector collective bargaining can advance the public interest.

But the fact that different States have chosen different paths cannot possibly justify barring all public employers from choosing agency fee arrangements intended to promote cooperative and productive labor relations in highly-complex environments, such as those *Amici* govern. Invoking the First Amendment to force state and local governments into a one-size-fits-all strait jacket ignores local conditions and experiences and amounts to "judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti*, 547 U.S. at 423.

III. The case for overruling *Abood* is wholly unpersuasive.

For more than forty years, *Abood* has provided a stable First Amendment framework for evaluating state and local laws that impose agency-fee requirements on public employees. In the more than 20 States that have authorized agency fees for public employee unions, the entire structure of labor-management relations has developed in reliance on *Abood*'s approval of such fees. To be sure,

disagreements have arisen over where to draw the line between germane union activities that may properly be supported by agency fees and non-germane political or ideological activity that may not. *See Lehnert*, 500 U.S. 507. But until this Court's very recent decisions in *Knox v. Service Emps. Int'l Union*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court had not so much as intimated that *Abood* should be revisited. To the contrary, the Court unanimously reaffirmed *Abood* as recently as 2009. *See Locke v. Karass*, 555 U.S. 207, 209, 213 (2009) (recognizing the "general . . . principle" that "[t]he First Amendment permits the government to require both public sector and private sector employees" to "pay a service fee to the local union that acts as their exclusive bargaining agent").

Language in the Court's decisions in *Knox* and *Harris* questioned *Abood*'s soundness, at least as a principle deserving expansion into new contexts. But both cases involved idiosyncratic factual scenarios that did not implicate *Abood*'s core concerns, as each case involved a context far removed from the integrity of the basic collective bargaining systems governing a public employee workforce. In *Knox*, the Court invalidated a one-time exaction intended solely to fund a union's political activities which did not advance the government's interest as an employer. Because the exaction had nothing to do with the effective operation of the collective bargaining system, the Court applied the heightened scrutiny appropriate when government regulates the citizenry as sovereign. And *Harris* involved individuals who were not full-fledged public employees at all. Their principal employers were

private individuals, and they worked in private homes. Indeed, as this Court emphasized, aside from provisions requiring collective bargaining, most of the laws that governed public sector employment did not even apply to these workers. 134 S. Ct. at 2634-35. Because the agency fees in that context bore such an attenuated relationship to the government's managerial prerogatives, the Court again applied heightened scrutiny.

Whatever the motivation for the Court's statements about *Abood* in *Knox* and *Harris*, the Court must now decide whether to take the rare and dramatic step of overruling a longstanding constitutional precedent that has generated substantial reliance interests. A careful analysis of *Abood*'s place in this Court's First Amendment jurisprudence – and of the propriety of second-guessing the judgments of democratically accountable governments about how best to respond to local conditions on a matter at the core of their official responsibilities – should yield only one conclusion: *Abood* must be reaffirmed.

Petitioner and the United States nevertheless contend that *Abood* should be overruled. That is not because of any sea change in the law that undermines the decision's jurisprudential foundation (indeed, the opposite is true, as the above discussion demonstrates). Nor is it due to any changes in underlying statutory frameworks or social conditions that undermine the decision's factual basis. Rather, according to Petitioner and the United States, *Abood* was simply wrong, undervaluing public employees' First Amendment interests in resisting collective bargaining and

overvaluing the government's managerial interest in utilizing that framework.

Those arguments are groundless. Nothing has changed since *Abood* that would justify concluding that the speech interests of employees *qua* employees in avoiding the obligation to pay agency fees should trigger exacting (much less strict) First Amendment scrutiny. And no developments since *Abood* call into question the strength of the government's interest as an employer in being able to choose agency-fee-supported collective bargaining as a tool of effective public administration. At bottom, the arguments for overruling *Abood* come down to antipathy to collective bargaining as a legitimate method of managing the public sector workforce. While Petitioner, and particularly the United States, insist that other managerial choices that may infringe public employee speech interests would still receive deferential review, they single out collective bargaining that includes agency fees for exacting First Amendment scrutiny that they would never countenance elsewhere.[2]

---

[2] Until it filed its brief in this case, the United States had endorsed *Abood* as striking the appropriate balance between public employee speech interests and the important interests of government, in its role as manager of the public workforce. U.S. *Amicus* Br., *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681); U.S. *Amicus* Br., *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (Mem.) (No. 14-915). The United States now believes that the governmental interests it previously thought important are insubstantial. It goes so far as to advocate a level of scrutiny here that would far exceed the level of scrutiny it believes should apply when a public employee speaks as a citizen on matters of public concern. *See*

Equally troubling, and despite their blithe assurances to the contrary, the arguments advanced by Petitioner and the United States threaten the well-established First Amendment principles that undergird the *Garcetti* framework. What Petitioner and the United States assert about public sector collective bargaining – that it necessarily involves matters of public concern, thereby triggering exacting scrutiny when government imposes agency-fee requirements – is equally true about most questions that arise in First Amendment cases under *Garcetti*. Any argument that the two should receive different levels of scrutiny lacks a principled foundation. Overruling *Abood* would therefore call this longstanding framework into question and subject government managerial decision-making to the kind of intrusive judicial micromanagement that this Court in the past has taken pains to prevent.

Employee interests. The argument that public employee speech interests are entitled to greater weight here than in the *Garcetti* context is wholly unpersuasive. Petitioner and the United States insist that a typical *Garcetti* case involves only the comparatively insubstantial interest of an individual employee complaining about discipline incurred for violating a workplace requirement. This is in contrast to what they claim is the broad class-wide harm an agency-fee requirement may inflict on employees opposed to paying such fees. *See* U.S. *Amicus* Br. at 10. That claim is wrong in every particular.

U.S. *Amicus* Br. at 9-10, *Garcetti*, *supra* (No. 04-473) (advocating for a deferential balancing framework).

To begin with, as a matter of bedrock First Amendment principle, the speech interests of individual employees adjudicated under the *Garcetti* framework are at least as substantial as the interests Petitioner asserts here – particularly when the employee's speech involves a matter of public concern, as it often does. Moreover, this Court has applied its balancing approach to speech-related conditions on public employment in cases involving broad class-wide rules as well as cases involving individual employee grievances. *See* p. 14 *supra*. And Petitioner and the United States identify no persuasive reason why the *Garcetti* framework would not continue to apply to a case challenging class-wide restrictions on employee speech on matters of public concern, as it does in cases involving individual employee disputes over discipline. Because First Amendment rights belong to the individual, the claims of each class member in such a scenario would be no stronger or weaker than the claims of the class as a whole.[3]

Petitioner and the United States also exaggerate the extent to which agency fees infringe employee speech interests. Mandatory agency fees affect an employee only within the structure of the employment

---

[3] This Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), is not to the contrary. The Court afforded heightened First Amendment protection to government employee speech interests in that context because the restriction at issue – which barred the receipt of honoraria by federal Executive Branch officials for any speech activity – imposed a uniquely sweeping ban that covered expressive activities across the country, even those with no connection whatsoever to the employees' job responsibilities.

relationship. They have no effect on the employee as a citizen, nor even on the employee's ability to publicly speak out or organize against the union, the negotiated terms, or the collective bargaining system itself. *Lehnert*, 500 U.S. at 521 (opinion of Blackmun, J.) (employees may "petition their neighbors and government in opposition to the union which represents them in the workplace"); *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 175-76 n.10 (1976) (employees may join anti-union organizations, or lobby their elected representatives, even opposing their unions' positions); *Abood*, 431 U.S. at 230.

Moreover, Petitioner's claim is entitled to no greater First Amendment solicitude because it is cast in terms of "compelled speech" rather than compelled silence. *See Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). When a public employee pays an agency fee, the only message the employee conveys is that he or she is an employee subject to a government fee required to support the union's official functions within the employer's system. An employee is not forced to associate with the union in any meaningfully expressive sense, or to endorse the union's goals or message in any way. There is certainly no basis for affording this employee speech interest greater First Amendment weight than an employee's right to speak as a citizen on matters of public concern.

Government interests. Petitioner and the United States also inappropriately denigrate the governmental interests at stake. Most strikingly, they make the unsupported assertion that a governmental

interest in collective bargaining has "little to do with the concerns of workplace discipline and efficiency usually given weight in *Pickering* balancing," and therefore claim that this interest does not justify the deference accorded in *Garcetti*. U.S. *Amicus* Br. at 28. That is self-evidently wrong. The threat to the government's interests as an employer, and the risks of widespread public service disruption, are far greater in matters involving large numbers of employees than in a grievance concerning a single individual. A transit strike is obviously more damaging to public administration than the reaction of a disgruntled token booth operator whose speech is restricted by a work rule. And more generally, collective bargaining agreements typically create and provide for the administration of the personnel management systems on which effective delivery of public services depends.[4]

The arguments advanced by Petitioner and the United States on this point ignore the tight connection between collective bargaining and the dispute

---

[4] This Court's decisions regarding political patronage practices provide no support for Petitioner's position. This Court has restricted the government's ability, in most cases, to use party affiliation as a prerequisite for public employment precisely because the connection between patronage practices and the government's interest in effective public administration is highly attenuated for most positions in the public sector. *Rutan*, 497 U.S. at 74. Even so, government may consider political affiliation if it "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," as is the case with some policymaking jobs. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

resolution procedures that they concede reflect substantial governmental interests. Dispute resolution and grievance procedures are at the core of the collective bargaining process. The exclusive representative (together with the public employer) plays a critical role both in using collective bargaining to establish the procedures used to protect employee interests and in administering those procedures. Again, it should be self-evident that a government's efficiency interests as an employer encompass an interest in maintaining employee morale – and that a fair, credible and effective dispute resolution procedure, recognized as such by employees, materially advances that interest.

This Court's decision in *Guarnieri* was particularly clear on this point. The case involved a public employee's claim that he should be able to invoke the First Amendment's Petition Clause to trigger exacting scrutiny of a government's rejection of his grievance filed in response to a disciplinary action. In rejecting that argument, the Court recognized the central role that formal grievance procedures play in advancing the government's "substantial interest in ensuring that all of its operations are efficient and effective." 564 U.S. at 386. As the Court observed, "the government can and often does adopt statutory and regulatory mechanisms to protect the rights of employees against improper retaliation or discipline, while preserving important government interests." *Id.* at 392.

Very often it is a collective bargaining agreement that puts such grievance procedures in place once a state adopts a law making grievance procedures a subject of collective bargaining. And typically the

employees' exclusive representative is responsible, jointly with the employer, for administering such procedures. The Court was unwilling to subject the results of such procedures to "invasive judicial superintendence" in *Guarnieri*, because doing so might disrupt their operation. *Id.* at 390-91. Yet what Petitioner and the United States propose is a constitutional rule that would interfere with public employers' ability to use collective bargaining to put just such procedures into place, imposing serious inefficiencies on such employer operations.

Consequences. Petitioner and the United States are equally cavalier about the consequences of overruling *Abood*. The disruption of settled expectations that have grown up around public sector collective bargaining supported by agency-fee requirements itself weighs powerfully against overruling *Abood*. What is more, accepting Petitioner's and the United States' effort to justify exacting scrutiny on the theory that "public-sector bargaining inherently involves public issues," U.S. *Amicus* Br. at 10, would inevitably undermine the *Garcetti* framework and threaten to constitutionalize the entire field of workplace management in the public sector.

Indeed, Petitioner appears to advocate precisely that result – insisting that "[e]nforcement of a collective bargaining agreement, *such as through the grievance process*, is just as political an act as bargaining for that deal." Pet. Br. at 14 (emphasis added). This is quite clearly an argument that exacting First Amendment scrutiny should apply to public sector discipline decisions and the grievance procedure decisions they trigger because those actions

by definition involve government actors and the expenditure of government funds. That Petitioner would advance such an argument is powerful confirmation of the sweeping consequences that would follow from overruling *Abood*.

Petitioner's argument that heightened First Amendment interests are at stake here because of the potentially enormous fiscal impacts of certain public sector collective bargaining agreements, *see id.*, likewise has no logical stopping point. The work of budget analysts, pension fund managers, tax administrators, and many other public employees can also have potentially enormous fiscal impacts. Do restrictions on their speech as employees now trigger heightened First Amendment scrutiny as well?

Even more broadly, Petitioner's view of what counts as employee speech on "public issues" that triggers exacting (or perhaps even strict) First Amendment scrutiny, directly threatens the Hatch Act, 5 U.S.C. § 7321 *et seq.*, and parallel state and local laws limiting partisan political activity by government employees. Such restrictions affect expressive interests at the very heart of the First Amendment – the right to participate in our nation's democratic process. If Petitioner's claim here triggers heightened First Amendment scrutiny because the employee interests are supposedly so connected to citizen concerns, it is difficult to see how a challenge to the Hatch Act would not.

Indeed, the consequences of overruling *Abood* would extend further still. This Court's precedent upholding mandatory dues requirements for attorneys who are legally required to join integrated bar associations

expressly relies on, and is not distinguishable from, *Abood*. *See Keller*, 496 U.S. 1. In *Keller*, the Court upheld state rules requiring attorneys to join a state bar association and pay dues, as long as those dues were related to "regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. The Court invoked the "substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id.* at 12. *Keller* relied on *Abood* for good reason: both cases are based on the Court's long-standing deference to the government's ability to manage its operations with respect to individuals who voluntarily enter into public employment (or, in the case of attorneys, employment serving the public justice system and managed by the government).

There is no principled way to distinguish agency fees to unions and mandatory dues to integrated bar associations. Any argument that the latter is somehow less "political" or involves no matters of public concern is unsound. *Keller* made clear, for example, that mandatory bar dues could support "proposing ethical codes for the profession." *Id.* at 16. If, as Petitioner would have it, all collective bargaining matters are inherently political, then a grievance based on an individual's absenteeism is sufficiently political to trigger exacting First Amendment scrutiny. It is difficult to see how advocating for specific rules governing the conduct of every attorney in a state could be considered less political. If anything, the Court has suggested that the justifications for imposing agency fees are *stronger* than those

supporting mandatory integrated bar dues. *See id.* at 12 ("The members of the State Bar concededly do not benefit as directly from its activities as do employees from union negotiations with management."). Overturning *Abood* would thus also open integrated bar associations to the threat of First Amendment challenge.

*****

Amici, like all elected state, municipal and county executives, are accountable to the people they serve. First and foremost, they are responsible for delivering public services efficiently and effectively. They need the flexibility to decide which model of labor-management relations best enhances their ability to fulfill these responsibilities. If their choices give rise to the kinds of problems that Petitioner and its *amici* complain about, the officials who made the choices can be held accountable at the polls.

Those responsible for administering the delivery of necessary services to the public are in the best position to decide whether workplace discipline and efficiency are best enhanced by seeking to make collective bargaining systems more effective, thus promoting better collaboration between government managers and their workforces and enhancing productivity. And those who seek to deny governments the authority to make effective use of collective bargaining have utterly failed to make the case that a public employee's interest in not paying mandatory agency fees deserves a special level of First Amendment scrutiny that even employee speech as a citizen on matters of public concern does not receive. It would therefore be a grave

error for the judiciary to decide, for the first time in our nation's history, that the Constitution forbids state and local governments from implementing effective collective bargaining systems that rely on agency fees for their effectiveness.

As bad as those consequences would be on their own terms, a decision overruling *Abood* could not be cabined in a principled manner to the particular context of agency-fee requirements. For if agency-fee requirements trigger exacting First Amendment scrutiny because they implicate speech on matters of public concern, then so too must government workplace restrictions of the kind at issue in *Connick* and *Garcetti* – not to mention well-established good government measures such as the Hatch Act. To overrule *Abood* is therefore to risk constitutionalizing every employment dispute in the public sector – thereby substituting judicial superintendence for the politically accountable judgments of seasoned public administrators, draining public resources into unproductive litigation, and further undermining the effective conduct of the public's business. This Court should not take that step.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Counsel of Record
DAHLIA MIGNOUNA
MUNGER, TOLLES & OLSON LLP
1155 F. Street, NW, 7th Floor
Washington, D.C. 20004
donald.verrilli@mto.com
(202) 220-1100

EDWARD N. SISKEL
CORPORATION COUNSEL OF
THE CITY OF CHICAGO
30 N. LaSalle Street,
Suite 800
Chicago, IL 60602

ATTORNEY FOR *AMICUS*,
MAYOR RAHM EMANUEL

SOZI PEDRO TULANTE
CITY SOLICITOR FOR THE
CITY OF PHILADELPHIA
1515 Arch Street,
17th Floor
Philadelphia, PA 19102

ATTORNEY FOR AMICUS,
MAYOR JAMES KENNEY

JANUARY 19, 2018